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PART II—Section 3

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ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 10th April 1953

S.R.O. 734.—WHEREAS the election of Shri Deva Sharan Sinha, as a member of the Legislative Assembly of the State of Bihar from the Fatwa Constituency of that Assembly has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951) by Shri Parmatma Singh S/o Babu Raja Singh, Village Masaurhi, P.O. Nandlalabad, P.S. Futwah, Sub-Division Barh, District Patna ;

AND WHEREAS the Election Tribunal appointed by the Election Commission in pursuance of the provisions of Section 86 of the said Act for the trial of the said petition has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its order to the Election Commission ;

NOW, THEREFORE, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said order of the Tribunal.

ELECTION TRIBUNAL, PATNA

PRESENT :—Shri Basu Prasad, Retired District Judge—*Chairman.*
Shri Hargobind Prasad Sinha, Retired District Judge—*Member.*
Shri Aditya Narayan Lal, Advocate—*Member.*

ELECTION PETITION NO. 177 OF 1952]

In the matter of election to the Bihar Legislative Assembly from the Fatwah Constituency in the sub-division of Barh, District Patna.

Shri Parmatma Singh resident of village Masaurhi, P.O. Nandlalabad, P.S. Fatwah, District Patna—*Petitioner.*

Versus

1. Shri Deo Saran Sinha, resident of Mohalla Chondi, P.O. Barh, District Patna.

2. Shri Braj Nandan Singh Jadav, resident of village Cheora, P.O. Khusrupur, P.S. Fatwah District Patna.

3. Shri Baliram Singh Jadav, resident of village Cheora, P.O. Khusrupur, P.S. Fatwah District Patna.

4. Shri Basdeo Narain Singh, resident of village Chootte Hasanpur, P.O. Khusrupur, P.S Fatwah, District Patna.

5. Shri Basudeo Mahto, resident of village Sarthua, P.O. Mohiuddinpur, P.S. Fatwah, District Patna.

6. Shri Garibanand Das, resident of Fatwah, P.O. and P.S. Fatwah, District Patna.

7. Shri Narsingh Singh, resident of village Andari, P.O. Nandlalabad, P.S. Fatwah, District Patna.

8. Shri Baij Nath Prasad, resident of village Abdullachak, P.O. Nandlalabad, P.S. Fatwah District Patna—*Respondents.*

FOR THE PETITIONER

1. Mr. A. N. Chakravarty, Advocate.
2. Mr. Kanhaya Prasad Verma (No. 2) Advocate.

FOR THE RESPONDENT NO: 1.

1. Mr. P. R. Das, Bar-at-law.
2. Mr. Lal Narain Singh, Advocate.
3. Mr. Balbhadra Prasad, Advocate.

Shri Parmatma Singh, who was a candidate for election to the Bihar Legislative Assembly from the Fatwah constituency in the District of Patna, has filed this petition under section 81 of the Representation of the People Act 1951, for a declaration that the election in the said constituency is wholly void on the ground that his nomination was improperly rejected by the Returning officer.

It appears that the petitioner had filed two nomination papers, one on 23-11-1951, and another on 24-11-1951, before the Returning Officer. On 26-11-1951., the date fixed for scrutiny of the nomination papers, the Returning Officer rejected the nomination of the petitioner, passing the following orders, "This gentleman is the contractor in connection with the Minor Irrigation Scheme No. 61 of 1949-50 and order issue of certificate has been passed for realising certain excess payment received by him. As such he is disqualified under section 7 (*d*) of the Representation of the People Act, 1951. Nomination paper rejected".

It is urged by the petitioner that he was not a person who could be disqualified for being chosen as a member of the Bihar Legislative Assembly under section 7(*d*) of the Act for the reason that he had no share or interest in any subsisting contract for the execution of any work undertaken by the Government of Bihar. It is alleged that the petitioner, as Headman of the village, was under an obligation to maintain the irrigation work in an efficient state under the provisions of the Bihar Private Irrigation Works Act, 1922. It is, further, alleged that on the dates of presentation of the nomination papers by the petitioner there was no subsisting contract between him and the Government and that the work entrusted to the petitioner in the capacity of the village Headman terminated before 25-6-1951, that is, long before the dates on which the nomination papers had been filed.

The petitioner contends that his nomination had been improperly rejected and that the result of the election has been materially affected by such rejection.

The election perition is resisted by Respondent No. 1., the returned candidate. He has filed a written statement alleging that the petitioner had entered into a contract in connection with the Minor Irrigation Scheme undertaken by the Government of Bihar and had executed an agreement in his individual capacity. He has also alleged that the petitioner had a subsisting contract in his favour within the meaning of the Representation of the People Act, 1951, on all material dates and was, therefore, disqualified for being chosen as a member of the Legislative Assembly. Lastly, it is alleged that the petitioner, even if his nomination were accepted, had no reasonable chance of success at the election.

Respondent No. 2 and Respondent No. 7 filed separate written statements, the former supporting the petitioner and the latter supporting the returned candidate, but they were absent at the trial.

The following issues arise for determination.

Issues

1. Was the petitioner not disqualified for being chosen as a member of the Bihar Legislative Assembly.

2. Was the nomination of the petitioner improperly rejected ? If so, has the result of the election been materially affected by such rejection ?

Findings

Issues Nos. 1 & 2.—These two issues are interrelated and may be conveniently dealt with together.

The main question to be considered in this case is whether or not the petitioner was disqualified under section 7(*d*) of the Representation of the People Act, 1951, for being chosen as a member

of the Legislative Assembly. The relevant position of section 7(*d*) runs as follows. "A person shall be disqualified for being chosen as a member of the Legislative Assembly of State if he has any share or interest in a contract for the execution of any works undertaken by the appropriate Government".

In the present case, the following facts are admitted. In May 1949, a scheme for repairs of certain irrigation works in village Masarhi was taken up by the Sub Divisional Officer of Barh under Chapter II of the Bihar Private Irrigation Works Act, 1922 ; the scheme was taken up as an emergent measure under section 5 A of the Act and so notices contemplated by section 3 of the Act which had to be served in ordinary proceedings for repairs upon the landlord and also upon every person known or believed to be under an obligation to maintain the irrigation work in an efficient state, were not required to be issued. Parmatma Singh (Petitioner), one of the prominent men of the village, executed an agreement (Ex. 3) on 4th November, 1949, agreeing to repair the irrigation works at an estimated cost of Rs. 2,508 by 4th December, 1949. The date for completion of the work was, subsequently extended to 15th May, 1950 (*vide* order dated 6-4-1950) of the S.D.O. contained in the Order-Sheet (Ex. 1). During the continuance of the agreement, Parmatma Singh took certain advances of money for carrying out the work ; he took Rs. 500, Rs. 800, and Rs. 300 on 3 different dates (*vide* Ex. 1). Parmatma Singh commenced the work, but did not complete it, and it appears that sometime in April 1950 he left the work unfinished after informing the Collector and the Sub-Divisional Officer.

The main contention of the petitioner is that there was no contract between him and the Sub-Divisional Officer for the repairs of the irrigation work, but there was a statutory obligation on him as headman of the village to carry out the said work. From section 21 of the Act it appears that a "village headmen" is one of the four classes of village agencies in whom the Collector, after making inquiry, vests, by means of an order, the duty of maintenance of certain irrigation works. I should like to point out at once that Chapter IV, under which section 21 lies, deals with "maintenance of small irrigation works by village agency". This is quite distinct from "repair and improvement of irrigation works" dealt with under Chapter II.

The repair work in the present case, as stated above, was taken up under section 5 A of Chapter II of the Act. Section 5 A contemplated two classes of persons who can be appointed to carry out the work, namely, (*i*) persons who are under an obligation to maintain the irrigation work in an efficient state, (*ii*) any other agency which is considered proper to carry out the work. From Rule 11 of the Rules, framed by the Governor of Bihar in exercise of the powers conferred by section 40 of the Act, it appears that any other agency in class (*ii*) can include a contractor.

The question to be decided, therefore, is, to which class did Parmatma Singh belong It has not been shown that he was a person on whom there was obligation to maintain the irrigation work in an efficient state. Even if he was a person on whom there was such obligation, it was open to him to agree or not to agree to carry out the repair work [See section 5(*1*) (*a*) of the Act]. If he had this choice, it cannot be assumed that there was a statutory obligation on him to carry out the repair work. But I shall presently show that Parmatma Singh really belonged to the other group of "any other agency" which can include a contractor.

From the Government Circular (Ex. 8), as also from the oral evidence of the petitioner (P.W. 4) it appears that, for the purpose of carrying out such work, a small Panchait of five public spirited and reliable persons of the village is formed with a headman and the Collector or the S.D.O. gets the work executed through the headmen. The petitioner admits in his evience that he was not the headman of the village before he signed the agreement (Ex 3). So, it is clear that he was made the headman only for the purpose of executing this repair work.

In the Estimates of the work in question (ex. 3a), the names of 5 villagers, including that of Parmatma Singh as headman, are noted. This is quite consistent with the Government Circular just referred to. But from this alone, it cannot be inferred that Parmatma Singh was a person on whom there was a statutory obligation to repair the irrigation work and that he was not a contractor. It seems to me that in choosing a contractor the Collector or the S.D.O. gives preference to a public spirited and reliable man of the village who is expected to execute the work properly and efficiently. But, nevertheless, the status of such man, in the eye of law, is that of a contractor.

The agreement (Ex. 3) makes the status of Parmatma Singh abundantly clear. On reading the document, there is no doubt that it embodies a contract within the meaning of Section 10 of the Indian Contract Act. There was consideration for the promise of each contracting party. Parmatma Singh promised to execute the work and the S.D.O. promised to pay him Rs. 2,508. The promise of one was the consideration for the promise of the other. Mr. A.N. Chakravarty, appearing for the petitioner, has tried in his argument to impress upon the Tribunal that there was no margin of profit in the amount estimated, namely, Rs. 2,508, and so it was not a contract. The question, whether by agreeing to execute the work for a consideration of Rs. 2508, Parmatma Singh made some profit or suffered some loss or did not make any profit or did not suffer any loss, is, in my view, wholly immaterial for judging the nature of the document.

The agreement (Ex. 3) contains a term that if Parmatma Singh fails to complete the work in the manner and within the time specified in the document he will render himself liable under section 5(3) (a) of the Private Irrigation Works Act, 1922 to such pecuniary penalty as the other party, namely, Sub-Divisional Officer, thinks proper. Section 5 (3) (a) provides for imposition of pecuniary penalty on a person who is required to carry out the work of repair under section 5 (1) (a), *i.e.*, on a person who is under an obligation to maintain the irrigation work in an efficient state and who also agrees to carry out the work of repair. So, at first sight, it may appear that Parmatma Singh who executed the agreement (Ex. 3), belonged to the group of persons on whom there was obligation to maintain the irrigation work in an efficient state. But it has been pointed out above that there are no sufficient materials for holding that view. What appears to me is that a term borrowed from the provisions of section 5 (3) (a) was inserted in the agreement as one of the terms of the contract and it cannot be argued that this was illegal. At any rate, it is clear beyond doubt that the agreement (Ex. 3) is a contract entered into by Parmatma Singh in his individual capacity and it cannot be interpreted as containing a statutory obligation of Parmatma Singh to carry out th repair work. If there were such a statutory obligation, there was no necessity of taking an agreement from Parmatma Singh. A mere order of the Sub-Divisional Officer directing Parmatma Singh to execute the repair work would have been sufficient.

The conclusion is, therefore, irresistible that Parmatma Singh entered into a contract for carry ing out the repair work.

The next question for consideration is, whether Parmatma Singh had or had not share or interest in the contract on the dates when he presented his nomination papers *i.e.*, on 23-11-1951 and 24-11-1951. The answer to this question will depend upon determination of the fact whether or not the contractual relationship between Parmatma Singh and the S.D.O. was subsisting on those dates.

The evidence clearly shows that Parmatma Singh did not complete the work contracted for but he executed work to the value of Rs. 1612-11-0 only. The Bill (Ex. 5 a), prepared in the Measurement Book, shows that the total earth work done was 102,409 cubic feet ; where as the Estimate (Ex. 3a) shows that Parmatma Singh undertook to do earth work to the extent of 209,130 cubic feet. Parmatma Sinh admits in his evidence that a part of the work, which he had to do under the agreement, remained unfinished. He says further that he could not complete the work as the village panches did not co-operate with him and he had diffidulties in getting money from the S.D.O. for doing the work. The agreement (Ex. 3) does not say that co-operation of the panchse advance of money by the S.D.O. will be condition precedent to the performance of the promise by Parmatma Singh. Chapter II of the Bihar Private Irrigation Works Act, 1922, under which this contract was given, also does not provide any such condition precedent. The S.D.O. made some advances of money from time to time as an aid to the contractor, though he was not bound to do so under the tems of the agreement. The explanation offered by Parmatma Singh, therefore does not exonerate him from the obligation under the contract.

Parmatma Singh, then, says in his evidence that he submitted an application (Ex. 6) to the collector on 8-4-1950, explaining why he did not complete the work and praying for measurement of the work already executed being made and also praying that another headman may be entrusted to execute the remaining part of the work and he may be relieved. The Collector wrote out a note (Ex. 6a) on the application on the same date, asking the SD.O. to direct the Overseer, if necessary, to make ameasurement in presence of the Circle Officer and to find ways and means to complete the work. The Collector observed in his note that if some of the panches stood in the way, the scheme should not be allowed to suffer. The S.D.O., in his turn, passed orders on 11-4-1950 directing the Circle Officer to get the work measured by the Overseer [*Vide* Ex 6(b]. Nothing appears to have been done till 28-3-1951 and it was on 29-3-1951, that measurement was made in presence of a Sub-Deputy Collector and Parmatma Singh. The Sub-Deputy Collector noted on the Measurement Book that measurement had been made in his presence and was correct (*Vide* Ex. 5). Parmatma Singh also signed on the Measurement Book. All these things happened on 29-3-1951. Nothing has been pointed to the Tribunal to suggest that there was some error in the measurements noted. A period of about 3 months, since the measurement was made, agai expired and on 25-6-1951 the bill was passed for Rs. 1512-11-0. This figure is, obviously, wrong. On looking into the Bill, it appears that the correct amount of bill should be Rs. 1612-11-0, and not Rs. 1512-11-0. There is mistake in making total of the two amounts, Rs. 1433-8-0 and Rs. 179-3-0, at the end of the bill. There is no evidence that Parmatma Singh was present at the passing of the bill and had an oppartunity to object to the bill being passed for a wrong amount, Rs. 1512-11-0. So, it cannot be assumed that he accepted a lesser amount in satisfaction of his claim. I shall have occasion to refer to this matter later.

It cannot be doubted that Parmatma Singh executed work to the value of Rs. 1612-11-0. Parmatma Singh definitely asserts this fact in his evidence. But he was paid only Rs. 1,600. This fact, as I shall show presently, has an important bearing on the question of contractual relationship subsisting or terminating.

When the bill was passed, and I must say, wrongly passed, for Rs. 1512-11-0, the S.D.O. made an order directing Parmatma Singh to refund the balance, Rs. 87-5-0, by 31-7-1951, as he

had already received advance of Rs. 1,600 (*vide* Ex. I). If the bill had been rightly prepared for Rs. 1612-11-0, a sum of Rs. 12-11-0 would have been payable by the S.D.O. to Parmatma Singh for the work already executed. When Parmatma Singh failed to refund Rs. 87-11-0, the amount was realized from him by means of a certificate proceeding on 18-11-1952. (*Vide* deposition of P.W. 4).

The evidence in this case is very scanty as to what ultimately happend to the contract or to the scheme of repair undertaken by the S.D.O. Neither the S.D.O., nor the Circle Officer, nor any other prominent man of the village has given evidence on these points. The petitioner only says in his evidence that after filing the petition (Ex. 6) he ceased doing the work.

The point to be considered is whether the contractual relationship between Parmatma Singh and the SD.O. came to an end before 23-11-1951 or whether such contractual relationship was subsisting on 23-11-1951 and 24-11-1951. The parties are at variance on this point. The petitioner contends that, in any event, there was no subsisting contract on those dates whereas the respondent No. 1 contends that on those dates there was a subsisting contract in favour of the petitioner.

A contract creates a legal obligation which subsists until discharged. Per formances of their respective promises by the contracting parties are the principal and most usual mode of discharge. But there are several other modes of discharge described in various sections under Chapter IV of the Indian Contract Act. The relevant sections here are sections 39 and 63. Section 39 provides "When a party to a contract has refused to perfrom, or disabled himse lf from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct his acquiescence in its continuance." Section 63 lays down "Every promisee may dispense with, or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit".

In the present case, Parmatma Singh did not execute the work in its entirety, nor did the S.D.O. pay him the full consideration, Rs. 2,508. So, there was no discharge by performances of their respective promises by the contracting parties. Let us, then consider whether there was discharge under section 39 or section 63. There is no clear proof of the fact that, when Parmatma Singh expressed his inability to execute the work in its entirety, the S.D.O. put an end to the contract or remitted the unperformed part of the promise of Parmatma Singh. The note (Ex.6a) of the Collector and the order (Ex. 6b) of the S.D.O. do not in my opinion, sufficiently show that the contract was terminated. There is no express order of the S.D.O. that Parmatma Singh be relieved from the obligation of performing the remaining part of the work. The work already executed was measured and the bill for the same prepared at the request of Parmatma Singh. But these things do not, in my view, necessarily indicate that the contract was terminated, specially when we find that the S.D.O. did not employ any other agency to execute the remaining part of the work as suggested by Parmatma Singh, and that he did not make an order abandoning the scheme at that stage.

It has been argued on behalf of the petitioner that the preparation of the first and final bill indicates that the contract came to an end. I am not in agreement with this contention. Rule 206 of the Bihar and Orissa Account Code 1926, at page 60, says that First and Final Bill should be prepared for making payments to contractors for work, when a single payment is made for a job or contract on its completion. Such bill has always reference to completion of the work. But in this case, the work contracted for was not completed. It is, therefore, doubtful that this form of bill was correctly used. The person, who prepared this Bill, has not been examined to clarify the position. Be that as it may, I find myself unable to hold that the preparation of the bill (Ex. 5a) gave discharge to Parmatma Singh.

The order of the S.D.O., demanding refund of Rs. 87-11-0 from Parmatma Singh, and the subsequent order for issue of certificate proceeding against him were based upon a mistake of fact, namely, that Parmatma Singh had executed work to the value of Rs. 1512-11-0 only. It has been discussed above that, in fact, Parmatma Singh had executed work to the value of Rs. 1612-11-0. The question of demanding refund, therefore did not arise. It has been argued by the learned Advocate for the petitioner that Parmatma Singh had to receive Rs. 12-11-0 more from the S.D.O. and that he had been wronged by the act of the S.D.O. in taking out the certificate proceeding against him. The certificate proceeding was clearly wrong and, at any rate, it cannot be construed as meaning that the S.D.O. terminated the contract. Even if it be assumed that the certificate proceeding was correct, it will only mean that the S.D.O. took steps to recover a part of the advance money which was in excess of the value of the work already done. The S.D.O. intended to make payment for the work executed and to recover the excess amount. But when the S.D.O. did not expressly put an end to the contract and when he did not either employ any other agency to carry out the remaining work or abandon the scheme, such payment for the work done will not necessarily point to the conclusion that the contractual relationship between the parties came to an end. But whatever the S.D.O. might have intended to do, he did not, in fact, perform his part of the promise in its entirety, by making full payment to Parmatma Singh for the work executed. And this has an important bearing on the question of termination of the contractual relationship.

It has been found above that Parmatma executed work to the value of Rs. 1612-11-0. The S.D.O., under the terms of agreement, was under an obligation to pay him Rs. 1612-11-0. But he paid only Rs. 1600. So, the S.D.O. did not perform his part of the promise in its entirety. It was open to Parmatma Singh to claim the amount, Rs. 12-11-0 from the S.D. O., or to remit that amount and accept Rs. 1,600 only in full satisfaction of his claim. There could not, therefore, be an end of the contractual relationship between the parties unless it be proved that Parmatma Singh (promisee) dispensed with, or remitted, the performance of the unperformed part of the promise by the S.D.O. (promisor). With regard to payment of money by the S.D.O. to Parmatma Singh, the latter will be in the position of a "promisee" and the S.D.O. in the position of a "promisor". In this case, however, there is no suggestion, far less any evidence, that Parmatma Singh remitted a part of the consideration of his promise or that he accepted a consideration of Rs. 1,600, in place of a consideration of Rs. 1612-11-0. The position therefore, is that the S.D.O. not having performed his part of the promise in its entirety, there was no end of contractual relationship and Parmatma Singh must be, therefore, considered to be interested in the contract. The fact that the amount remaining unpaid was small is wholly immaterial.

In Satyendra Kumar Das *Vs.* The Chairman of the Municipal Commissioner of Dacca, reported in I.L.R. 58 Calcutta 180, it has been held that when a contractor has performed his part of the promise, but the other party has not performed its part of the promise and payment to the contractor is outstanding, the contractor must be deemed to be interested in the contract. In the above case, the contractor was held disqualified for being elected as Commissioner of Dacca Municipality as, although he had already supplied certain goods to the Municipality and the bill had been passed, the bill remained unpaid at the date when his nomination paper was sent in. It may be noted that the provisions of the Bengal Municipal Act, 1884, and the Bengal Municipal Election Rules, 1917, dealing with such disqualification, are similar to the provisions of section 7(d) of the Representation of the People Act, 1951.

It may be urged that Parmatma Singh paid the certificate dues to the S.D.O., thereby relinquishing a part of his claim and acquiescing in the satisfaction of his claim at Rs. 1,600. Such relinquishment and acquiescence may put an end to the contractual relationship under section 63 of the Contract Act. In a recent Election case, P. Seshaiah *Vs.* K. Koti Reddi, decided by the Election Tribunal, Bellary (decision has been published in the *Gazette of India*, Extraordinary, dated January 19, 1953), it has been held that, when the contractor relinquishes his claim under the contract, the contractual relationship comes to an end and no disqualification under Section 7(d) of the Representation of the People Act, 1951, can be attached to him. In the present case, it has not been shown that Parmatma Singh relinquished a part of his claim and acquiesced in the satisfaction of his claim at Rs. 1,600 on or before 23-11-1951. The certificate dues were paid on 18-11-1952, and so, if any such relinquishment and acquiescence can be inferred from the conduct of Parmatma Singh, the relinquishment and acquiescence were made on 18-11-1952, *i.e.*, long after the presentation of the nomination papers. The contractual relationship cannot, therefore, be deemed to have terminated on or before 23-11-1951.

I, upon a careful consideration of all the facts, come to the conclusion that the contractual relationship between Parmatma Singh and the S.D.O. subsisted on the dates of presentation of the nomination papers by the former. In view of the above finding, I hold that the petitioner was disqualified under Sec. 7(d) of the representation of the People Act, 1951 and that his nomination was not improperly rejected. I shall therefore, answer issue No. (1) and the first part of issue No. (2) against the petitioner.

The second part of issue No. (2), in view of my above findings, does not arise. But if I am to express my views on this point, I will hold that if the nomination of the petitioner be held to be improperly rejected, there will be a presumption that the result of the election has been materially affected by such rejection. This presumption not having been rebutted in the present case, it will prevail and the whole election is to be declared void.

(Sd.) B. PRASAD, *Chairman.*

HIGH COURT, PATNA;

The 2nd April, 1953 ;

I agree that the repair work was done by the petitioner on basis of contract freely entered into by him. But in my opinion this work of contract had come to an end long before the petitioner filed his nomination paper on 23rd November 1951. The Ordersheet of the emergency Minor Irrigation Works (court Ext. 1) and the agreement Ext. 3 executed by the petitioner show that the work of repair was to be completed by 4th December 1949 failing which the petitioner was liable to have penalty imposed on him. The order sheet also shows that the S. D. O. was

making enquiry from time to time as regards the progress of the work which the petitioner had undertaken to do. But when he found that the petitioner was not doing the work undertaken by him he passed order on 6th April 1950 directing the petitioner to complete the work by 15th May 1950 or the amount (Rs. 1,600) advanced to him will have to be refunded. But in spite of this stringent order the petitioner filed petition (Ext. 6) dated 8th April 1950 before the Collector informing him that he had given up the work of repair and made a request that the work done by him uptill then be measured, final bill be prepared, and the work that still remained to be done may be entrusted to somebody else. The Collector referred this petition to the S. D. O. and in course of his note on it made certain observations expressing opinion that the scheme should not be allowed to suffer. We should always bear in mind that the contract into which the petitioner had entered for doing the repair work is quite distinct from the scheme of repair which had been sanctioned by the S. D. O. So simply because the Collector expressed the desire that the scheme should not be allowed to suffer it does not mean that he intended that the contract with the petitioner should not be ended even though the later had expressly made a request to this effect. The S. D. O. by his order dated 11th April 1950 [Ext. 6 (b)] directed the Circle Officer to get the work done by the petitioner measured by the Overseer in presence of the petitioner. There was delay in making this measurement and it was made on 29th March 1951. On its basis a first and final bill was prepared for Rs. 1,512/11/- in respect of the work found to have been done by the petitioner. On basis of this first and final bill the ordersheet shows that an order dated 28th June 1951 was passed as follows— "first and final bill has been received from C. I. duly checked by Mr. Tripathi, S. D. O. for 1,512/11/-. Rupees 1,600 has already been advanced to him. Ask him (Pramatma Singh) to refund the balance Rs. 87/5/- by 31st July 1951". Pramatma Singh did not refund the amount found due from him, and the S. D. O. by his order dated 23rd August 1951 directed issue of a certificate for recovery of the amount overpaid to him. All these facts taken together leave no doubt that the contract entered into by the petitioner came to an end when the S. D. O. passed order for issue of certificate for realisation of the amount found due from him. It has been urged that the S. D. O. was within his rights to issue a certificate for the realisation of Rs. 87/5/- which was found to have been overpaid to the petitioner. But when as shown by the ordersheet Rs. 500/-, Rs. 800/- and Rs. 300/- were being advanced to the petitioner without any measurement being made of the work done by him, it appears rather ridiculous that the S. D. O. should have ordered the recovery of the small sum of Rs. 87/5/- by a certificate proceeding, if he was not accepting the request of the petitioner to terminate the contract and had really intended that the petitioner should continue to do the work as before. It was been also urged that the first and final bill prepared for the work done by the petitioner does not mean termination of his work. It only means payment for the work done by him uptill then and it was expected that when he would do further work subsequent payment would be made. But I am unable to accept this contention as correct. The petition (Ext. 6) filed before the Collector shows that only a small portion of the work had remained to be done by the time the petitioner had made up his mind to give up the contract work. The petitioner shows that only two *Khanrh* (breach in embankment) had remained to be filled up. One to the the extent of half and the another to the full. So if the intention had been to make payment only for the work which had been completed uptill then, and that the petitioner would continue to do the work, then there can be no doubt that the 'Khanrha' which had been filled up only to the extent of half would not have been included in the measurement and no payment would have been made for it. The first and final bill has a special significance attached to it under the Account Code. It means single payment for a contract on completion. The scheme as sanctioned had not been completed when this first and final bill was prepared as two breaches in the embankment, had remained to be filled. But so far as the petitioner was concerned he had given up the contract and had come to an end of his work. The only thing that could have been done in respect of the work done by him was to prepare a first and final bill. So I have no doubt that the preparation of the first and final bill means ending of the contract by the petitioner and its acceptance by the S. D. O. It has been argued that so far as the petitioner is concerned there was no full payment of his bill and so the contract should be deemed to be subsisting and not to have come to an end. According to the petitioner the calculation made in Ext. 5 A that he had worked to the extent of only Rs. 1,512/11/- is not correct as the correct total comes to Rs. 1,612/11/-. So it has been contended that when the petitioner was not paid Rs. 12/11/- which was still due to him the contract cannot be considered to have come to an end. The petitioner has also no doubt claimed in his evidence that he had done work to the extent of Rs. 1,612/11/- and not only for Rs. 1,512/11-. But when the work done by the petitioner was calculated at Rs. 1,512/11/- and on this basis a certificate case was started against him for recovery of Rs. 87/5/-, it is difficult to accept that the real amount of the work done by him was Rs. 1,612/11/- and not Rs. 1,512/11/-, specially when he raised no objection to the certificate proceeding and never claimed before the S. D. O. that Rs. 87/5/- was being wrongly realised from him. So it appears that there has been some mistake somewhere and the real amount of the work done by the petitioner was only Rs. 1,512/11/-as shown in ordersheet. Even if it be conceded that the real amount due to the petitioner was Rs. 1,612/11/- and so Rs. 12/11/- still remained due to him, it makes no difference and it does not mean that the contract continued to be operative and subsisting. There can be no doubt that if after the preparation of the final bill the S. D. O. had realised that Rs. 12/11/- was to be paid to the petitioner over and above the amount already received by him he would have made payment of this sum and would not have started a certificate proceeding for Rs. 87/5/-. So

simply because Rs. 12/11/- remained unpaid to the petitioner it does not mean that the contract continued to subsist when all the circumstances of the caseleave no doubt that both the petitioner and the S. D. O. had come to a decision to end it. It is true that so far as the S. D. O. is concerned there are no express words to end this contract as is the case with the petitioner. But the entire course of his conduct leaves no doubt that he had also the intention to end the contract as was asked for by the petitioner. It is significant that inspite of the order of the S. D. O. dated 6th April 1950 directing the petitioner to complete the work by 15th May 1950 on pain of having to refund the amount advanced to him the petitioner instead of trying to complete the work as was to be expected from him, filed petition dated 8th April 1950 giving out in unequivocal words that he did not intend to do the repair work. This petition was received by the S. D. O. on 11th April 1950. As was desired by the petitioner he ordered the C.O to get the work done measured and did not take any step to have carried out his orders dated 6th April 1950 under which the petitioner had been directed to complete the repair work by 15th May 1950. Though the petitioner did not do any work of repair the S. D. O. did not take any step against him and ultimately the work done by the petitioner was measured on 29th March 1951, and on its basis final bill was prepared and step was taken to recover the amount found due from him. If the S. D. O. had the intention to keep the contract subsisting it is expected that some step must have been taken by him directing the petitioner to complete the work. But nothing in this connection was done after the petitioner filed his petition (Ext. 6) giving up the contract work. So I have no doubt that the S. D. O. also intended to end the contract as was the express desire of the petitioner. If these actions of the S. D. O. cannot be interpreted as ending the contract I do not see what more he was expected to do by his conduct to end it. Even if it be conceded that these actions of the S. D. O. did not end the contract on his part and that in law it continued to subsist so far as he was concerned all this means is that when the petitioner refused to do the repair work he was liable for breach of contract. But the contract as such did not exist. Section 7 clause (d) of the Representation of the People's Act, 1951 contemplates that in order to escape disqualification for being a member of Parliament or of State Legislature the candidate should have no share or interest in a contract for the execution of a work undertaken by the appropriate Government. When the petitioner in his petition (Ext. 6) dated 8th April 1950 expressed in unequivocal words that he had given up the contract work he, in my opinion, ceased to have interest or share in the contract which entailed disqualification for standing as a candidate. For these reasons I am of opinion that the nomination paper of the petitioner has been improperly rejected. It has been conceded before us that if the nomination paper of a candidate has been improperly rejected, it raises a presumption that the result of the election has been materially affected and the election of the successful candidate should be set aside. This presumption has not been rebutted. So petition is allowed and the election of the respondent No. 1 to the Bihar Legislative Assembly is set aside.

The 2nd April 1953. (Sd.) HARGOBIND PARASAD SINHA, *Member*.

This election petition has been filed by one Shri Parmatma Singh who was a candidate for election as member of the Bihar State Assembly from the Fatwah Constituency in the Sub-Division of Barh, District Patna. The original petition was against ten persons, out of which Respondent No. 1, the Returning Officer of Fatwah Constituency and (2) State of Bihar have been deleted. Therefore, now Respondent No. 1 is Sri Devasharan Sinha who has been declared to be the successful candidate. The case of the petitioner is that he duly filed his Nomination Papers before the Sub-Divisional Officer, Barh who was the Returning Officer, on 23rd November 1951 and 24th November 1951 complying with all the necessary requirements and showing deposit ; on the day of scrutiny, that is to say, on 26th November, 1951 the Returning Officer rejected the Nomination Paper of the Petitioner and passed the following orders, "This gentleman is the contractor in connection with M. Irrigation Scheme No. 61 of 1949-50 and order issue of certificate has been passed for realizing certain excess payment received by him. As such he is disqualified under Section 7 (d) of the Representation of People Act, 1951 Nomination Paper rejected".

The main case of the petitioner has been detailed in paragraph 5 of the Election Petition, which is quoted verbetim below :—

"*Para 5.* That the petitioner was not a person who could be disqualified for being chosen as a member of Legislative Assembly under Section 7(d) of the Representation of the People Act, 1951, for the following reasons :—

(*a*) "That the petitioner was not a person who had any share or interest in any subsisting contract for the supply of goods to, or for the distribution of any work or performing of a service under State by the Government of State of Bihar.

(*b*) That the petitioner as headman of the village was under an obligation to maintain the Irrigation work in an efficient State under the provision of Bihar Private Irrigation Works Act, 1922,

(*c*) That under the Minor Irrigation Works Scheme a headman of the village is enjoined by law to do certain work in connection with minor irrigation and it is a duty cast on him under the law and not by any contract entered into with the Government.

(*d*) That Act 5 o f1922 empowers the Collector to impose on the person as entrusted with the execution scheme of irrigation, a pecuniary penalty, which is made recoverable as a public demand payable to the Collector.

(*e*) That the Collector under the Act passes an order declaring that the maintenance of the work shall be entrusted in the village agencies, *e.g.*, Village Panchayat, a village headman.

(*f*) That to secure an efficient and prompt discharge of the function, a form of agreement is signed by the person, on whom is enjoined the work of Irrigation, particularly in order to make him liable under the Bihar Private Irrigation Works Act.

(*g*) That in any event at the time of presentation of the Nomination Paper by the petitioner there was no subsisting contract between the petitioner and the Government of State of Bihar to do any work under any law or contract".

In paragraph 6, the petitioner says, "That the order passed by the Collector makes the village agencies responsible for the proper maintenance of irrigation work. But the village agency is in no case in the position of contractor. The further case of the petitioner is contained in paragraph 7 which runs as follows :—

" That the work entrusted to the petitioner in the capacity of village headman terminated before 26th June 1951 long before the date on which the Nomination Papers were required to be filed ". The petitioner, therefore, submits that the result of the election in this Constituency has been materially affected by the improper rejection of the Nomination Paper of this petitioner and on this ground along the election is wholly void. On the grounds mentioned above the petitioner prayed that the election of Fatwah Constituency may be set aside as wholly void on the ground that the nomination paper of the petitioner was wrongly, illegally and improperly rejected.

Two written statements have been filed :—One by the successful candidate Sri Devasharan Sinha who is the Respondent No. 1 the other by Shri Brijnandan Singh who is Respondent No. 2 and the third by Sri Narising Singh who is Respondent No. 7. The main defence of Respondent No. 1 is that the petitioner had a subsisting contract in his favour within the meaning of the Representation of People Act, 1951 at all material dates and was, therefore, disqualified for being chosen as a member of the Legislative Assembly of the State of Bihar ; that the disqualification of the petitioner is conclusively established by the agreement and ordersheet regarding the irrigation work undertaken by the petitioner ; that the Collector passed no order making any village agency responsible for the irrigation work in question ; that the petitioner entered into a contract as an individual. The fact that he was also the headman of the village did not affect the nature of the contract or the legal consequences.

The Respondent No. 2 supports the petitioner, while the Respondent No. 7 supports the Respondent No. 1. His further case is that he had also filed a Nomination Paper but he was also a contractor under the Minor Irrigation Work and his nomination paper was rejected. He further says that the certificate case which was filed for excess amount is still pending against the petitioner in the court of Certificate Officer, Barh in connection with Minor Irrigation Work Scheme 61 of 1949-50.

The petitioner has adduced documentary and oral evidence. The Respondent No. 1 who alone is contesting neither filed any documentary evidence nor did he examine any witness. He had filed an application to examine three witnesses but at the trial they were given up.

The following issues arise in this case for consideration :—

(1) Was the petitioner not disqualified for being chosen as a member of the Bihar Legislative Assembly?

(2) Was the nomination of the petitioner improperly rejected ? If so, has the result of the election been materially affected by such rejection ?

Issue No. I.—The real question in issue No. I resolves itself into two main parts :

(1) Whether the contract in the present case was subsisting on the relevant date,

(2) Whether it was an obligation cast on the petitioner by Statute, *i.e.* Bihar Private Irrigation Works Act, 1922 that is to say it was a duty cast on him under the law and not by any contract entered into with the Government.

I shall take up the first point first. The entire ordersheet of minor irrigation case No. 61/2 of 1949-50 of village Masarhi is on the record as Court Ext. I. The Ext. 3(*a*), dated 29th May, 1949 is the Estimate of minor irrigation work of village Masarhi. The amount mentioned is Rs. 2,508 on 30th May, 1949 an application of village Masarhi for repair of irrigation work in village Masarhi duly sanctioned by the Committee appointed for it was received. The scheme was taken up under Section 5A of the Bihar Private Irrigation Works Act, V of 1922 on account of its emergent nature. The Sub-Divisional Officer ordered on 30th May, 1949 that half cos

will be realised from the persons benefited later on. It was ordered to be put up after rains A petition Ext. 7 was filed on 14th June 1949 before the Sub Divisional Officer, Barth by Audh Behari Singh, Jangbahadur Singh, Sri Ram Singh and Parmatma Singh to this effect :—

> "Scheme was given by overseer on 28th May, 1949. We could not execute the agreement due to want of Beldars. But now we have given earthwork of Rs. 800. As Parmatma Singh is ill, we could not come to you for the agreement. Therefore, agreement should be taken from Parmatma."

Ext. 7 (*a*) dated 14th June, 1949, the order of the Circle officer on the petition Ext. 7 is "Office to report". There is a report of the office dated 14th June, 1949 on the petition which is not exhibited, as follows :—"The scheme was sanctioned by the Committee but it was ordered to be taken up after rains".

The order of the Sub Divisional Officer dated 16th June, 1949 on the petition is, "Wait till rain is over". [(Ext. 7 (*b*).]

The agreement executed by Sri Parmatma Singh is Ext. 3. I shall refer to this agreement in detail later on. There is no date on this agreement. But from the order sheet Ext. I it is clear that on 4th November, 1949 the agreement was filed by the headman which was accepted. The order of the Sub Divisional Officer on 4th November, 1949 is as follows : "Issue written order to complete the work by 4th December, 1949, failing which penalty would be imposed. Issue notice under Section 5A of the Private Irrigation Works Act that the work has begun." Thereafter there are orders of the Sub Divisional Officer to pay Rs. 500 and Rs. 800 on 16th December, 1949 and 30th December, 1949 respectively. It appears from the order sheet Ext. I that the work was not completed within the stipulated time, that is to say 4th December, 1949 and the period was extended to complete the work from time to time. On 17th February, 1950, a further sum of Rs. 300 was given. When the work was not completed, ultimately the Sub Divisional Officer on 6th April, 1950 ordered as follows :—

> "The work has not been completed. Ask the headman to complete it by 5th May, 1950 or the whole amount advanced will have to be refunded".

It appears that two days after, that is to say, on 8th April, 1950 Sri Parmatma Singh submitted a petition before the Collector who had gone to Saidanpur Masarhi H. E. School for Prize Distribution (P. W. 4). This petition is Ext. 6 and is very important. After narrating that he is the village headman, he executed the agreement and he got advances from time to time, he narrates his difficulties and helplessness to complete the repair work. The relevant portion of the petition is as follows :—

> "Therefore I had to give up the work under compulsion. Two *khands* of my estimate remain undone—One whole and the other half. Therefore it is my prayer to your honour that the Circle Officer may be ordered to measure whatever work I have done and make it final and after that to get a new estimate prepared and entrusted to those who would become the headman of the village and I may be relieved of this work."

The petitioner was asked by the Collector to take the petition to the Sub Divisional Officer and the Collector made the following remarks on the petition :

> "I was at Saidanpur Masarhi yesterday. I have noted some earthwork in Masarhi. I would request you to ask Circle Officer to inspect and find out. If necessary you may ask overseer to make measurement in presence of Circle Officer and to find ways and means how to complete the work. If some of the Punches stand in the way, the Scheme should not be allowed to suffer. At Saidanpur also I found a lot of work done. Here I was told that estimate was not made. It should be included."

When the petition was taken to the Sub Divisional Officer, Barh he passed the following orders on 11th April, 1950.

> "Circle Officer to get the work measured in his presence by the Overseer."

The measurement was made 5 or 6 months after the stoppage of the work (P. W. 4) Ext. 5 is the endorsement on the measurement book in the name of Mr. Tripathy which is dated 29th March, 1951. Ext. 5(*a*) is the First and Final bill of Scheme 61 of 1949-50 of village Masarhi, dated 29th March, 1951. The order sheet Ext. I records the following order on 25th June, 1951.

> "First and Final bill has been received from Circle Inspector duly checked by Mr. Tripathy Sub Divisional Officer for Rs. 1,512-11-0, Rs. 1,600 has already been advanced. Ask him to refund the balance (Rs. 87-5-0) by 31st July 1950."

Ext. 4 is the certified copy and Ext. 5 (*b*) original copy of the order of the Sub Divisional Officer, Barh dated 25th June, 1951 on the First and Final Bill, Scheme 61 of 1949-50.

In Ext. I there are two more relevant orders. The order dated 31st July, 1951 is as follows :—

"S. R. of notice not received nor the headman deposited the balance. Await and put up on 23rd August, 1951".

On 23rd August, 1951, the following order was passed :—

"Notice was served by hanging it on the door of the headman in presence of the Sarpanch. No deposit made. Issue certificate".

It is to be noted that the Sub Divisional Officer, Barh was the Certificate Officer, as well as the Returning Officer. It is in evidence (P. W. 4) that the certificate dues were realised from the petitioner on 18th November, 1952.

We have seen above that two nomination papers were filed by the Petitioner—one on 23rd November, 1951 and the other on 24th November, 1951. The entries in the nomination papers were checked and the nomination papers were ordered to be placed on 26th November, 1951 at 10-30 A.M. for scrutiny. On 26th November, 1951 Sri B. Narayan, the Returning Officer passed the following order while rejecting the nomination paper :—

"This gentleman is the Contractor in connection with Minor Irrigation Scheme No. 61 of 1949-50 and order issue of Certificate has been passed for realising certain excess payment received by him. As such he is disqualified under Section 7(*d*) of Representation of People Act. Nomination paper rejected."

The real question is whether the petitioner was disqualified under secton 7(*d*) of the Representation of the People Act 1951 on the dates he filed the nomination papers. The relevant portion of Section 7 is as follows :—

"*Section* 7.—A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of State.

(*d*) if whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he has any share or interest in a Contract for the supply of goods to or for the execution of any works or the performance of any services undertaken by the appropriate Government."

The genesis of this disqualification mentioned in Section 7(*d*) of the Representation of People Act, 1951 is traceable to similar disqualifications in Canada, United Kingdom and Australia. I shall shortly deal with some of those provisions and the case law on that topic.

1. Revised statutes of Canada, 1927, Col. II, Chapter 53, Section 39(*c*).

"The respective persons hereunder mentioned shall not for the time specified as to each such person be eligible as candidate at an election, namely :—

(*c*) Every person directly or indirectly, along or with any other person, by himself or by interposition of any trustee or third party, holding or enjoying, undertaking or executing any contract or agreement express or implied, with or for the Government of Canada on behalf of the Crown, or with or for any of the officers of the Government at Canada for which any public money of Canada is to be paid—during the time he is so holding, enjoying undertaking, or executing."

2. By 22 Geo. 3, C. 45, Section I, applied to the Parliament of the United Kingdom of Great Britain and Ireland by 41. Geo. 3, C. 52, Section I—Ireland 41, Geo. 3, C. 52 Section 4—any person, directly or indirectly etc., undertaking or enjoying, in the whole or in part any contracts, etc. made with the Commissioners of the Treasury, Commissioners of the Navy or victualling offices etc., or generally on account of the public service, is disqualified from being elected or sitting.

The above statutory provision No. 2 creating this disqualification is to be found in section I of the House of Commons (Disqualification) Act, 1782, which was extended by section I of the House of Commons (Disqualifications) Act, 1801, to the New Parliament, *viz.* Parliament of the United Kingdom.

Certain principles have been established as a result of the decisions of the Court under these statutes and from the statutes themselves. They have been summarised in *Norman's Parliamentary Elections*, 1950 Edition p. 91. One of the principles mentioned at p. 93 is as follows :—

"Secondly, the contract must be capable of being executed after the member's election. An executed contract does not disqualify."

In the case of *Royse V. Birley* (1869) 38 L.J.C.P. 203—20 L.T. 786—17 W.R. 827, a contract for the supply of goods had been executed by the Contractor before the election. The goods had been delivered to and accepted by the Government. At the time of the election nothing remained to be done except to pay the Contractor the price which had also been ascertained

before the election. The court in that case held that as the contract has been executed before the election the member was not disqualified. It was confirmed in Trantor *V.* Astor (1917) 33 T.L.R. 383 in which it was held that a contract which had been entered into and executed at the time of sitting and voting in the House did not invoke the disqualification provided for in 1782 and 1801 Acts.

In *Rogers on Elections* Vol. II., p. 22 (Twentieth Edition, 1928) on the basis of the above two cases it has been remarked that the above Act applies to executory contract only and not to contracts completely executed before the election and where all that remains to be done is for the Government to pay the money.

In *Leominster* (1827) an objection was taken to the return of B on the ground that he was a lottery contractor. It was argued for B that the Act did not apply to a Contract for Lottery, and if it did that the Contractor had expired at the time of the election. It was held that he was disqualified.

But *Normen* in his Parliamentary Election 1950 at p. 92 says, this case appears now to be in doubt as it was argued without effect that the contract was completed at the time of election. It is now clear from the second principles (which had been stated above) that the completion of the contract before election does not disqualify.

It is significant to note that in the bigger Election Manual, published by the Government Part V Miscellaneous Notes, at page 611, there is a topic. "Regarding Contractors". Under this topic the statutes of Canada, United Kingdom and Australia have been quoted and case-laws discussed. This shows that these statutes and the case-law are intended to be of some help in deciding cases of disqualifications under section 7 of the Representation of the People Act, 1951.

I shall now discuss some of the cases decided in 1952-53 by Election Tribunals in India.

We have been referred to a decision of the Election Tribunal, Bellary (Madras) reported in the *Gazett of India*, dated 19th January, 1953, *Extraordinary*—Part II—Section 3 at page 145 (*i*). It has been held in that case that once it is proved that the person concerned has interest in a contract the disqualifications would operate whether or not the work has been completed. This view seems to be against the English decisions on the point. They have relied on Satendra Kumar *Versus* the Chairman of Municipal Commissioner of Dacca I.L.R. 58, Cal. 180. In that case the facts were : the plaintiff sued for a declarations that they were qualified to be elected Commissioners of Dacca Municipality. Their Fathers' Firm had supplied road materials to the Municipality. Their bills for the materials supplied were passed by the Chairman, but remained unpaid at the date when the nomination papers were sent in. It was held that the contract had not terminated as the plaintiffs were interested in it and consequently were disqualified from being elected.

But the Bellary Election Tribunal finally held that in as much as respondent had relinquished his claim for monies due to him, he was not subject to disqualification mentioned in section 7 clause (*d*) of the Representative of the People Act, 1951. Therefore the observations of the Bellary Tribunal that the party must be considered to be interested in the contract when he has not received payment is merely an *Obiter dictum.*

The other cases cited at the Bar are not important for the decision in this case.

But the case before us is a different case altogether. In this case it is not necessary for us to decide that the contract came to end after the execution of the work and before the payment of bills. Whatever divergence of judicial opinion there may be with regard to the point whether the Contract subsists till the payment of the bill, there is no doubt that where the work has been executed and payment has been made for the work, nothing remains to be done by either party a contract is at an end. Let us examine the exact position in this case in the light of the facts stated already in the beginning.

On 6th April, 1950 the Sub Divisional Officer ordered the headman to complete the work by 5th May 1930 or the whole amount advanced will have to be refunded. Immediately after it the petitioner on 8th April, 1950 submitted a petition before the Sub Divisional Officer Ext. 6, in which he made the following prayers (I) Circle officer may be ordered to measure whatever work I have done and make it final (2) to get a new estimate prepared and entrusted to those who would become the headman of the village and (3) I may be relieved of this work.

It has been argued by the petitioner that this case comes either under section 39 or section 63 of the Contract Act. The petitioner on 8th April, 1950 by his petition Ext. 6, refused to perform his promise in its entirety and the promisee put an end to the contract and thus he brings the case under section 39 of the Contract Act. He invokes the provision of section 63 by saying that the promisee dispensed with or remitted in part the performance of the promise made to him and therefore it was a contract which need not be performed. It appears to me that the present case comes under section 39 of the Contract Act. There is no doubt

that on 8th April, 1950 the petitioner clearly signified his refusal to perform his promise in its entirety. But this is not all that the section requires. In order to take advantage of the section it must be shown that the promisee put an end to the contract. Therefore it is essential to examine the orders passed by the authorities on the petition Ext. 6 and the conduct of the authorities after the filing of this petition.

The collector recommended the petition on that very date *i.e.*, on 8th April, 1951 and requested the Sub Divisional Officer to ask Circle Officer to inspect and find out and if necessary to ask overseer to make measurement in presence of Circle Officer and to find out ways and means to complete the work. He also remarked that if some of the Punches stand in the way, the Scheme should not be allowed to suffer. On 11th April, 1950 the Sub Divisional Officer ordered Circle Officer to get the work measured in his presence by the Overseer. For many months to come nothing was done by either party. The measurement was made on 29th March 1951 nearly a year after the Sub Divisional Officer's order to measure. On the strength of this measurement the First and Final Bill was prepared on the same date that is to say on 29th March, 1951 for Rs. 1,512-11-0 on 25th June, 1951 the Sub Divisional Officer passes the following order.

> "First and Final Bill has been received from C.I. duly checked by Mr. Tripathi Sub Divisional Officer for Rs. 1,512/11/0 Rs. 1,600 has already been advanced. Ask him to refund the balance (Rs. 87/5/-) by 31st July, 1951."

It is significant that in the First and Final Bill as well as in the order sheet the amount mentioned is Rs. 1,512/11/- it has been stated above that the certificate proceeding was started on 13rd August, 1951 and the Certificate dues were realised on 18th November, 1952. This Election petition was filed on 19th April, 1952 and in it the petitioner does not challenge the Certificate proceedings ; nor does he make any grievance on the scope that the First and Final Bill was passed for a wrong amount. The respondent No. 1 also does not mention about this Certificate proceedings in his written Statement though he has filed along with his written statement the order sheet culminating upto the Certificate proceeding. There is no doubt that the petitioner in his evidence and argument has attempted to develop a case that the certificate proceeding was wrongly taken out. The petitioner in his examination in chief says " I had done the work worth Rs. 1,612-11-0 " and in the Cross examination he says " I had explained to my lawyer the circumstances under which I had been able to do the work to the extent of Rs. 1,600 the money under the certificate proceeding was realised from me on 18th November, 1952. I had filed no petition when I had become aware of the certificate proceeding that nothing was due from me and the certificate was wrong ".

However, whatever may be the real fact and whatever mistake might have crept in totalling of the amounts in the First and Final Bill, it is quite clear from the conduct of the parties that both of them took Rs. 1,512-11-0 as the correct amount which was passed against the First and Final Bill and on that basis the certificate proceeding was started. In my view whether the correct amount is Rs. 1,612-11-0 or Rs. 1,512-11-0 it does not change the position in law. If the correct amount is Rs. 1,612-11-0 and Rs. 1,600-0-0 was already paid, then surely the petitioner will be deemed to have relinquished the remaining amount by his conduct. It is no party's case in the pleading that the petitioner was to be paid Rs. 12-11-0 more. In case the correct amount is Rs. 1,512-11-0 as understood by both the parties and as mentioned in the First and Final Bill and the ordersheet, then for the balance the Sub Divisional Officer took out certificate proceeding which has nothing to do with the contractual relations. In any view of the matter, I feel sure, that the contractual relation ceased at least after the certificate proceeding started. At any rate petitioner's interest in the contract ceased from that date.

The real point to be decided is whether the Sub Divisional Officer has put an end to the contract after the petitioner had communicated to the Sub Divisional Officer his refusal in unmistakeable terms to perform his promise in its entirety. No doubt there is nothing on the record to show that he by words either put an end to the contract or acquiesce in the continuance of the contract. But the fact that the Sub Divisional officer put an end to the contract can be inferred from his conduct as well. His conduct may be gathered from the following circumstances :—

(1) The order of the Sub Divisional Officer to measure the work done by the petitioner.

(2) The actual measurement of the work in presence of the petitioner.

(3) The preparation of the First and Final Bill which was passed by the Sub Divisional Officer.

(4) The order of the Sub Divisional Officer dated 25th June, 1951 which shows that the First and Final Bill was received from the Circle Inspector duly checked by Mr. Tripathi Sub Divisional Officer for Rs. 1,512-11-0.

(5) Adjustment of Rs. 1,600 which was advanced to the petitioner and striking a balance against the petitioner of Rs. 87-5-0 to be refunded by the petitioner by 31 July, 1951.

(6) The undue haste in starting the certificate proceeding for this small sum.

(7) Absence of attempt on behalf of the Sub Divisional Officer to get the remaining work executed through the petitioner.

The cumulative effect of all these circumstances is that the Sub Divisional Officer treated the contract as terminated and thus he put an end to it.

It was contended by the respondent that the First and Final Bill has no special significanceand that the bill is final with regard to the work already done and which had been measured; it is first in sequence of events it means that other bills had to follow. But from Bihar and Orissa Account Code, First Edition, 1926 p. 60 Rules 205-209, I find that First and Final Bill has get a technical and special significance. Rule 206 is as follows.

"First and Final Bill, Financial Rule Form No. 12.—This form should be used for making payments both to the contractors for work and to suppliers, when a single payment is made for a job or contract i.e. on its completion. A single form may be used for making payments to several payees, if they relate to the same work (or to the same head of account in the case of supplies) and are billed for at the same time."

The use of the work First and Final Bill indicates that authorities treated the work of the petitioner as completed and this First and Final Bill was used as this was the first and Final payment to the petitioner for a contract on its completion so far as the petitioner was concerned. If the work was to be continued by the petitioner and the Contract was subsisting then in that case Running Account Bill A or C mentioned in Rr 207-209 would have been used. Therefore, I conclude that the First and Final Bill was used by the authorities with full knowledge of the implications of this term and this is a pointer to the direction that the Sub Divisional officer put an end to the contract.

I shall now take up the second point in Issue No. 1. In order to determine this point it is essential to summarise the scheme of the Bihar Private Irrigation Works Act, 1922.

Chapter I deals with the "Preliminary", that is to say, short title and extent and definitions. Chapter II deals with "Repair and improvement of Irrigation works". Whenever is appears to the Collector—(a) that the repair of an existing Irrigation work is necessary for the benefit of any village etc. etc. (b) that is it desirable for the purpose of settling or averting disputes or preventing waste of water or injury to land.....that any sluice weir, outlet, escape, headwork, dam or other work should be constructed in any irrigation work....., he may serve under section 3 two kinds of notices (i) on the land lord of the land in which the irrigation work is situated and public notice at convenient places in every village in which the irrigation work is situated stating that he intends to take action under Chapter II.....and specifying the date on which the enquiry under section 4 will be held and

(ii) On every person known or believed to be under an obligation to maintain the irrigation work in an efficient state, calling on him to show cause on the date specified in the notice why he should not be required to repair the said work or extend or alter it as a foresaid. After making an enquiry under section 4 the Collector if satisfied about the disrepair of the irrigation work, shall under section 5 (I) issue an order in writing requiring that the proposed work of repair, extension or alteration shall be carried out.

(a) by one or more of the persons on whom notice under clause (ii) of Section 3 have been served that is to say persons known or believed to be under an obligation to maintain the irrigation work in an efficient state and who agrees or agree to carry out the said work or,

(b) by such agency as he thinks proper, if, for reasons to be recorded by him, he considers that there are adequate reasons why any person mentioned in clause (a) should not be entrusted with the carrying out of the said work. Every order made under section 5 (I) shall specify as closely as may be practicable, the nature of the work to be done the estimated cost of executing it and the manner in which and the time within which it shall be executed [Section 5 (2). If any person under obligation to maintain the irrigation work and required by the Collector to carry out any work of repair, extension or alteration fails to do so .....the Collector may impose on him such pecuniary penalty as he thinks proper [Section5(3).]

A separate provision is made for proceedings in emergency. If the Collector is of the opinion that the work is urgent, he may dispense with the notices and enquiry under sections 3 and 4 of the Act, and he may forthwith cause the repair of such irrigation work to be begun by any one or more of the persons under obligation to maintain the irrigation work or by such agency as he thinks proper. If the person under obligation to maintain the irrigation work and required under section 5 (I) (a) or section 5A (i) to carry out any work of repair, extension or alteration fails to do so the Collector may, subject to any rule under section 40 by a written order, authorise any agency to carry out the said work in the manner and within the period specified in the order.

Sections 7 and 8 are devoted to recovery of cost of work and apportionment of such costs where the work of repair, extension or alteration has been carried out by a person under obligaion to maintain the irrigation work.

Section 9 provides when any work of repair extension or alteration is carried out by any agency under section 5 (1) (b) or Section 5A or under section 6 an account shall be kept of the actual expenses incurred and shall be submitted to the Collector as soon as possible after the work has been completed and the Collector is authorised to revise any account so submitted to him after making an enquiry he considers it necessary to do where any work of repair, extension or alteration has been carried out by any agency mentioned in section 5 (I) (b) Section 5A or Section 6 the Collector shall apportion the expenses amongst the person or persons liable to pay the sam

as detailed in section 10. Sections 11 and 12 deal with Collector's award as to recovery of such expenses apportioned under section 10 and for recovery of such cost as a public demand.

It is thus clear that section 5 I (b) , Section 5A, S. 6 and sections 9 to 12 deal specifically with the case where any work of repair, extension or alteration is carried by an agency. It seems the work agency has been used in generic sense in these sections which have been clarified in later Chapters.

Chapter III deals with Maintenance of of irrigation works by Government Agency. Under section 15, if the Collector is satisfied, he may issue an order in writing directing that the work shall be taken over and maintained by the Provincial Government. The Collector may authorise any person or agency to take over and maintain the irrigation work on behalf of the Provincial Government. [Section 15 (3).]

The heading of Chapter IV is "maintenance of small irrigation works by village agency". It applied only to the class of irrigation works mentioned in section 19. If on enquiry the Collector is satisfied that the irrigation work is not being properly maintained.....he may under S. 21 make an order declaring that the maintenance of the work shall be vested from the date of the order in any of the following agencies :

(a) A *Panchayat* of not less than 5 nor more than 9 persons to be selected by him from those interested in the maintenance of the said work, and to include one person to represent the interest of the landlords of the land which is irrigated therefrom.

(b) A co-operative Society whose membership is confined to the village or villages in which the area irrigated is situated.

(c) A village *Panchayat* or similar body constituted under any law for the time being in force and having jurisdiction over the area irrigated from the said work or, if there is more than one village *Phanchayat* or similar bodies having jurisdiction over such area to the village *Phanchayat* or body similar having jurisdiction over the major portion of the area or,

(d) A village headman.

There is no doubt that in the present case the repair of the irrigation work in villgae Musarhi was done under Chapter 2 and not Chapter 4. But village agency has been defined or described for the first time in section 21. This village agency is one of the agencies mentioned in sections 5(I) (b), 5A, 6 and sections 9 to 12 of the Act. This repair work in my opinion, was entrusted for execution to the village agency mentioned in section 21 (a) that is to say "a *Phanchayat* of not less than five nor more than nine persons to be selected by him (Collector) from those interested in the maintenance of the said work." It is in evidence that "A headman is selected in connection with Minor Irrigation Scheme. The Sub Divisional Officer selects him The name is submitted to him by Karamchari or Circle Officer. The headman has to execute an agreement in connection with minor irrigation works" (P.W.2). "The Sub DivisionalOfficer himself used to select the man for doing the minor irrigation work..... the Sub Divisional Officer appoints the headman" (P.W.3). "The Sub Divisional Officer calls for names of five prominent men of village through the Karamchari . He makes one of them headman and gets executed by him an agreement for doing the Minor Irrigation Work" (P.W.4). Ext. 8 is the copy of the Circular of the Government of Bihar Revenue Department dated 19-4-1948 Para 6 of the Circular is as follows:—

"Some small *Phanchayat* of five public spirited and reliable persons should be formed with a headman. The headman should be made responsible for having the work executed within the time allotted. Payment should be made only after actual measurement and on the basis of work done."

Ext. 9 is the copy of the circular of the Government of Bihar-Revenue Department dated 12-2-1953. This is no doubt a circular of a very recent date. It cannot be used to govern the case before us. But all the same it can be inferred that previous to this circular also the selection of agency was made in the same order of preference. The circular dated 12 -2-53 says that the order of preference, in selecting the agency by the Collector should be as follows:—

(a) A duly established *Gram Panchayat* under the Biher Raj Gram Panchayat Act, 1947.

(b) Multi-purpose Co-operative Society.

(c) An *ad-hoc Panchayat* of five responsible persons of the village. If (a) and (b) are not available is also stated that if the three agencies are not there then the work should be entrusted to a contractor.

At any rate from Ext. 8 itself it is evident that under section 21 of the Act a small *Panchayat* of five persons is formed with a headman. This *Panchayat* along with the headman is entrusted with the maintenance of the work as mentioned is Section 21 (a). I therefore infer from this that the petitioner is a person who is under no obligations to maintain the irrigation work. Keeping this position in view we have to examine some of the sections of the Act. Under section 5 (3) the Collector may impose pecuniary penalty as he thinks proper in all the circumstances of the case and the same is recoverable as public demand. Under section 7 (b) the Collector can after disallowing any charge which he considers unreasonable and reducing any charge which he considers excessive determine the cost

of the work payable to the applicant. Under section 9 (2) the Collector may revise any account so submitted to him if after making an enquiry he considers it necessary to so. No doubt in section 5 (a) it is mentioned that the proposed work of repair shall be carried out by one or more of the persons on whom notices under clause (ii) of section 3 have been served and who agrees or agree to carry out the said work. Firstly the petitioner does not come under clause (a) but he comes under clause (b) under the wording "Such agency" and in this clause (b) the words "who agrees or agree" to carry out the said work are absent. But in this case it is quite evident that there is an agreement executed by the petitioner which is Ext. 3. In Ext. 3 we find that the petitioner has been made liable under section 5 (3) (a) to such pecuniary penalty as the Sub Divisional Officer thinks proper. The question remains whether the obligation is under the law imposed by the Private Irrigation Works Act, or under the agreement. Taking into consideration the various provisions of the Act under which the Collector enjoys excessive powers mentioned above.

I am inclined to think that the agreement is not a contract but may be termed to be only a license superimposing certain obligation on the petitiner. But the question is not free from doubt. I therefore do not propose to decide this point as it is not necessary for the determination of this case, in view of my findings on point No. I in issue No. I.

But before concluding I desire to point out that the Legislature is rightly contemplating to have the Representation of People Act, 1951 so amended as to get the questions relating to the validity of nomination papers finally disposed of before the holding of the election. It is obligatory on the Tribunal to set aside the election and order a fresh election when there is an improper acceptance or rejection of a nomination paper, if the result of the election has been materially affected by such acceptance or rejection. Nomination papers have been rejected by the Returning Officers sometimes due to inexperience and some times under a mistaken view of law. This is what I have noticed in Election petition No. 86 of 1952 Baidhnath Pd. Versus Chandeshwar Pd. and Election petition No. 225 of 1952 Kalika Pd. Versus Hayat Chand already decided by this tribunal. In the present case also I feel that the post election remedy is wholly inadequate. Therefore some form should be provided to decide the nomination disputes before the actual election.

Therefore, I hold that at the dates of filing the nomination papers the petitioner was not disqualified under section 7 (d) of the Representation of the People Act.

Issue 2. —Consequently the nomination paper has been improperly rejected. The presumption in law is that the result of the election has been materially affected which has not been rebutted by the respondent.

I, therefore, set aside the election of the Fatwa Constituency as wholly void on the ground that the nomination paper of the petitioner was illegally and improperly rejected.

As no objection was taken by the respondent as to the disqualification of the petitioner and the Returning Officer under the mistaken view of law rejected the nomination paper of his own motion, no costs are awarded against the respondent. The parties shall bear their own costs.

The 2nd April 1953 : (Sd,) ADITYA NARAYAN LAL *Member*

JUDGMENT OF THE TRIBUNAL

According to the majority opinion of the members, the Tribunal finds that the petitioner was not disqualified for being chosen as a member of the Bihar Legislative Assembly and that his nomination was improperly rejected by the Returning Officer.

The Tribunal, further, finds, according to the unanimous views of the members, that the result of the election has been materially affected by the rejection of the petitioner's nomination which, according to the majority opinion, was improper.

The Tribunal, therefore, declares the election to be wholly void.

As the election petition has arisen on account of error on the part of the Returning Officer, the Tribunal considers that each party should bear its own costs.

ORDER

The election petition be allowed and the election to the Bihar Legislative Assembly from Fatwah Constituency be declared wholly void. Each party shall bear its own costs.

(Sd.) BASU PRASAD, (*Chairman*)

HIGH COURT, PATNA ; (Sd.) ADITYA NARAYAN LAL, *Member.*

The 2nd April, 1953.

(Sd) HARGOBIND PRASAD SINHA, *Member.*

[No. 19/177/52-Elce. III/4559.]

By Order,

P. R. KRISHNAMURTHY,—*Asstt. Secy.*

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